INTERIOR BOARD OF INDIAN APPEALS

Gloria Quiver and Jeanette Fay Quiver v. Deputy Assistant Secretary - Indian Affairs (Operations)

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

GLORIA QUIVER
v.
DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

and

JEANETTE FAY QUIVER
v.
DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 85-17-A, 85-18-A Decided December 27, 1985

Appeals from November 6, 1984, and December 7, 1984, decisions of the Deputy Assistant Secretary--Indian Affairs (Operations) concerning the collection and distribution of lease payments from certain Indian trust allotments.

Affirmed.

1. Indian Probate: Klamath Tribe--Indians: Lands: Fee Lands--Indians: Nonrestricted Property

   Because of the Klamath Termination Act, the Bureau of Indian Affairs has no authority to hold land in Indian trust status for members of the Klamath Tribe.

2. Indians: Lands: Generally

   The Bureau of Indian Affairs is not a tenant in common with the non-trust holders of fee interests in an Indian allotment.

APPEARANCES: Gary Forrester, Esq., Portland, Oregon, for appellant Gloria Quiver; Harvey Keller, Esq., Portland, Oregon, for appellant Jeanette Fay Quiver; Wayne Nordwall, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

On January 22, 1985, the Board of Indian Appeals (Board) received notices of appeal from Gloria Quiver and Jeanette Fay Quiver (appellants). Appellants, respectively, sought review of November 6, 1984, and December 7, 1984, decisions issued by the Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) declining to collect and distribute lease payments to them for their undivided fractional interests in certain Indian allotments. Because these cases involve identical factual and legal issues, they are hereby consolidated for decision. For the reasons discussed below, the Board affirms the decisions.

Background

Appellants are members of the Klamath Tribe. Both Federal supervision over the Klamath tribe and Federal services to members of the tribe because of their Indian status were terminated by the Act of August 13, 1954, ch. 732, 68 Stat. 718, 25 U.S.C. §§ 564-564x (1982). 1/ Peter Quiver,

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1/ The purpose and intent of the Klamath Termination Act is set forth in section 564:

"The purpose of this subchapter is to provide for the termination of Federal supervision over the trust and restricted property of the Klamath Tribe of Indians consisting of the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians, and of the individual members thereof, for the disposition of Federally owned property acquired or withdrawn for the administration of the affairs of said Indians, and for a termination of Federal services furnished such Indians because of their status as Indians."

appellants' deceased father and a member of the Federally recognized Burns Paiute Indian Colony, died intestate on March 16, 1966. On October 24, 1967, a Departmental Examiner of Inheritance issued an order determining his heirs. The Examiner found that Peter Quiver owned fractional interests in Burns Paiute allotments 5, 14, 36, 37, 49, 52, 54, 55, 107, and 108, and that each of the present appellants inherited 1/3 of Peter Quiver's fractional holdings. The remaining 1/3 interest went to Julia Christina Quiver, another daughter of Peter Quiver, who is also a member of the Klamath Tribe but not a party to this appeal. Because appellants were members of a terminated tribe, there was no authority for the United States to hold land in trust status for them. The Examiner, therefore, found that their interests in these allotments were inherited in fee. Bailess v. Paukune, 344 U.S. 171 (1952).

Appellants each own from 1/6 to 5/288 fee interests in the ten allotments. 2/ Most of the remaining interests in the allotments also belong to Indians but are primarily in either Indian trust or restricted status. 3/ The Bureau of Indian Affairs (BIA) has approved leases of the Indian trust interests in these allotments, and the Superintendent of the Warm Springs Agency (Superintendent), BIA, has signed leases on behalf of certain unprobated Indian trust estates. Each of the leases approved by BIA clearly shows that it covers less than a full ownership interest.

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2/ The record indicates that appellants each own the following interests: 1/72 interest in allotment 5; 1/24 interest in allotment 14; 5/288 interest in allotment 36; 5/288 interest in allotment 37; 1/72 interest in allotment 49; 5/288 interest in allotment 52; 1/6 interest in allotment 54; 1/6 interest in allotment 55; 1/42 interest in allotment 107; and 1/36 interest in allotment 108.

3/ Although not certain from the record, it appears that some of the remaining interests may also be in fee.

A. Gloria Quiver

Apparently in response to an inquiry from appellant Gloria Quiver, the Superintendent, on September 8, 1983, provided her with a listing of her fee interests in the ten allotments and the names of the lessees of the trust or restricted interests. The Superintendent's letter stated at page 1:

> You have not been receiving lease rental payments for your interests in the Burns allotments because you are a terminated Klamath Indian. We do not have the authority to lease Fee interests, only the trust interests. You will have to negotiate directly with the lessees to lease your interests in these allotments.

In a second letter, dated October 18, 1983, appellant was informed by the Superintendent that, if her interests had been in trust, she would have received approximately $123.95 per year from the leases.

By letter dated January 24, 1984, the Assistant Area Director (Program Services), Portland Area Office, also informed appellant that to lease her interests, she would have to negotiate directly with the lessees because "the Bureau does not have the responsibility or authority to lease [your] fee interests." On February 21, 1984, through counsel, appellant sought review of this decision by the Portland Area Director (Area Director). The notice of appeal states:

> [H]er interests in these allotments have been leased by the Bureau without consultation with or the agreement of Ms. Quiver. The Bureau had made the valuations and determined the terms of the leases. Ms. Quiver's interests are undivided interests and there is no evidence that the lessees have "sectioned off" a portion of the land which represents Ms. Quiver's interests.

> In view of this assumption of responsibility by the Bureau regarding Ms. Quiver's interests, we believe that the Bureau retains at least the responsibility to collect and distribute the lease payments owing to Ms. Quiver regardless of her status as a member of a "terminated" tribe. Any other conclusion would mean that Ms. Quiver is bound by contracts negotiated on her behalf by the Bureau, but cannot avail herself of the assistance which the Bureau provides to other lessors in enforcing those contracts. * * * Ms. Quiver's status as a member of a terminated Indian tribe should not be a factor. Ms. Quiver's interest derives from her Paiute heritage, not from her Klamath heritage.

By letter dated March 16, 1984, the Area Director responded to appellant's notice of appeal. His letter explained that the January 24, 1984, letter did "not constitute an appealable 'decision' but rather [was] a statement of a factual situation." The Area Director stated that because appellant was a member of the terminated Klamath Tribe, she inherited her interests in the allotments in fee. Because of his finding that there was no appealable decision, the Area Director dismissed the appeal.

However, the Area Director also reported to appellant's counsel the results of his inquiry regarding the status of the leases on the allotments. Referring to a copy of each of the leases enclosed with the letter, he stated at page 2:

> You will note that only the undivided trust interests were leased--not those of your client [Gloria Quiver] or any other fee owners. The Agency informs us that when they are leasing properties which have undivided fee interests, the lessee is informed of this and instructed to contact the fee owners to obtain their consents. The lessee has the same rights to use the land for the purpose specified as do the trust owners who leased it to him. It is up to the lessee, not the Bureau, to reconcile himself with the fee owners. Since the Bureau did not do anything wrong in leasing the trust interests in the property, and <u>since the Agency neither leased the fee interests nor collected money for those interests, no action by this office is deemed necessary</u>. If you feel that your client has been harmed by the actions of the lessees, you should bring action against the tenant. [Emphasis added.]

Appellant filed an appeal from this letter with appellee, again arguing that no portions of the leased lands had been sectioned off to represent her interests, and there was no evidence that BIA had reduced the lease value by any amount that would represent her share. Appellant further alleged that BIA had not made her interests clear to the lessees. She repeated that her interests in these allotments derived from her Paiute background.

Appellee accepted appellant's appeal and issued a decision on November 6, 1984. He stated the issue raised by the case was whether "the Bureau of Indian Affairs retain[s] the responsibility to collect and distribute lease payments due Ms. Quiver regardless of her status as a member of a terminated tribe." Decision at 3. Appellee concluded at page 4:

> Since the Bureau has the authority to lease only the trust interest in the property, and since the Agency neither leased the fee interests nor collected money for those interests, and since the Order Determining Heirs was specific in its intent, we therefore must support the decision of the Portland Area Director in full, and deny that the Bureau has the responsibility, or the authority, to collect and distribute lease payments to your client.

Appellant's appeal from this decision was received by the Board on January 22, 1985. Both appellant and appellee filed briefs.

B. Jeanette Fay Quiver

The appeal of appellant Jeanette Fay Quiver followed essentially the same pattern as that of her sister, except for the dates of some of the decisions. Thus, the initial letter from the Superintendent was dated February 23, 1984. The Area Director's letter was dated March 26, 1984,

and appellee's decision was dated December 7, 1984. Appellant Jeanette Fay Quiver's notice of appeal to the Board was received on January 22, 1985, the same day as her sister's. Appellant filed consolidated briefs with her sister.

Discussion and Conclusions

On appeal appellants raise three questions:

> (1) Has the Bureau of Indian Affairs, as a tenant in common with the Quivers, breached its fiduciary duty of care by receiving from the lessees rents for the above-described allotments?
>
> (2) Has the Bureau of Indian Affairs failed to develop and publish rational and proper standards and procedures for leasing allotments containing individual interests such as the Quivers', in violation of the Administrative Procedure Act?
>
> (3) Has the Bureau of Indian Affairs, by leasing the allotments without notice to the Quivers and not giving them an opportunity to be heard, violated the due process clause of the United States Constitution?

Opening brief at 1-2. Appellants seek the following relief:

> (1) That the BIA be required to account to Gloria Quiver and Jeanette Fay Quiver for all rental monies received by the BIA on the allotments aforementioned, and be required to pay to Gloria Quiver and Jeanette Fay Quiver, for their respective interests, such sums of money for rental income during the entire period of time the BIA has leased the allotments without their authorization, knowledge, or consent, and
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> (2) An order requiring the BIA to adopt a procedure for informing potential lessees that Gloria Quiver and Jeanette Fay Quiver have outstanding interests in the leaseholds which do not come within the terms of the lease the BIA is administering, and requiring prospective lessees to negotiate and enter into lease agreements with Gloria Quiver and Jeanette Fay Quiver before the BIA can enter into leases with said prospective lessees.

Opening brief at 8-9.

[1] In effect, appellants' arguments attempt to overrule the Klamath Termination Act. As members of the Klamath Tribe, appellants are no longer entitled to the same protections involving land as members of Federally recognized Indian tribes. Under 25 U.S.C. § 564g(b) (1982), "[t]he titles to all interests in trust or restricted land acquired by members of the [Klamath] tribe by devise or inheritance four years or more after August 13, 1954, shall vest in such members in fee simple, subject to any valid encumbrance." For purposes of the ownership of land, appellants are in the same status as non-Indians. The United States has no authority to hold land in trust for them, and BIA has no trust responsibility to them in land matters. 4/ The fact that appellants inherited these interests from a member of a Federally recognized tribe, the Burns Paiute, does not overcome the legal effect of their own membership in the Klamath Tribe.

Appellants try to avoid the results of the Termination Act by arguing the law of cotenancy. It appears appropriate, therefore, to begin this discussion with an overview of the law of cotenancy. Appellants hold interests in these Indian allotments as tenants in common, in that there is unity of possession, but not of title, interest, or time. 5/ Thus, although each owner

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4/ The fact that the Klamath Tribe may still be recognized as an Indian group for other purposes, including treaty obligations, does not alter the fact that the tribe is no longer Federally recognized for land purposes.

5/ In brief, unity of possession means that each tenant has an equal right to possession of the property; unity of interest means that each tenant owns an equal share of the property; unity of title means that each tenant received title through the same conveyance; and unity of time means that the interest of each tenant began at the same time. 4 G. W. Thompson, Real Property, § 1777, at 15-16 (1961), (4 Thompson). See also Cohen, Handbook of Federal Indian Law at 616 (1982 ed.).

may own a different percentage of the property, each holds an undivided fractional interest in the whole property and has a right to the use and possession of the property. No one cotenant or group of cotenants has the right to exclude other cotenants from the property. Consequently, if one cotenant uses or develops the entire property and receives full value for that use or development, there is a duty to account to the other cotenants for their shares of the return. That did not occur here. On the contrary, a cotenant using or developing the property is not an agent for the other cotenants, and a lease executed by one cotenant does not bind the other cotenants. However, the lessee of one cotenant has a duty to recompense the other cotenants for their proportionate shares to the extent that he makes use of the entire property. Because each cotenant has a right to possess the whole, none has a right to exclusive possession of any part. 4 Thompson § 1793 at 111-116.

[2] Appellants first argue that BIA, as their tenant in common, has a fiduciary duty to account to them for their share of the lease revenues. This argument cannot be accepted because BIA is not a tenant in common with appellants. The fractional shares in each of the allotments owned by the Indians who are still under Federal supervision are held either in trust or restricted status. In either case, the right to possess, use, and lease the land remains with the Indian owners, except where they have authorized the Secretary to lease the land on their behalf, 25 CFR 162.2. That was not the case here. BIA has no right to the possession or use of Indian trust or restricted land. It has only limited statutory and regulatory rights and duties, including approval or disapproval of conveyances of the land by the protected Indian owners. See 25 CFR 162.3-162.6. Cf., United States v.

Algoma Lumber Co., 305 U.S. 415 (1939) (Held: Federal approval of a contract for the harvesting of Indian timber does not make the Government a party to the contract, which remains a contract between the Indian tribe and the timber company). BIA has no authority over any fractional interest in an Indian allotment that is owned by a non-Indian or an Indian who is a member of a terminated tribe. Appellants' tenants in common are the other owners of the land, whether they are Indian or non-Indian. Any accounting must, therefore, be sought directly from the other cotenants. 6/

Appellants also contend that Indian allotments can be partitioned under 25 CFR 152.33. 7/ They apparently suggest that BIA should first have partitioned individual sections of the allotments for their exclusive use before it undertook the leasing of the land.

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6/ If any such accounting is sought, it would be expected that, as trustee, BIA would produce its records to show the amount and disposition of the lease revenues it has collected on behalf of the Indian owners.

7/ Section 152.33 states:

"(a) Partition without application. If the Secretary of the Interior shall find that any inherited trust allotment or allotments (as distinguished from lands held in a restricted fee status or authorized to be sold under the Act of May 14, 1948 (62 Stat. 236; 25 U.S.C. 483)), are capable of partition in kind to the advantage of the heirs, he may cause such lands to be partitioned among them, regardless of their competency, patents in fee to be issued to the competent heirs for their shares and trust patents to be issued to the incompetent heirs for the lands respectively or jointly set apart to them, the trust period to terminate in accordance with the terms of the original patent or order of extension of the trust period set out in said patent. (Act of May 18, 1916 (39 Stat. 127; 25 U.S.C. 378).) The authority contained in the Act of May 18, 1916, is not applicable to lands authorized to be sold by the Act of May 14, 1948, nor to land held in restricted fee status.

"(b) Application for partition. Heirs of a deceased allottee may make written application, in the form approved by the Secretary, for partition of their trust or restricted land. If the Secretary finds the trust lands susceptible of partition, he may issue new patents or deeds to the heirs for the portion set aside to them. If the allotment is held under a restricted fee title (as distinguished from a trust title), partition may be accomplished by the heirs executing deeds approved by the Secretary, to the other heirs for their respective portions."

The record is insufficient to show whether title to the protected allotments is in trust or restricted status. For most purposes, the distinction is immaterial. However, the rules for partitioning trust and restricted lands set forth in 25 CFR 152.33 differ. See Cohen, supra at 618 n. 66, 622-24. If the land is in trust status and is not subject to the Act of May 14, 1948, BIA could have partitioned the land without the heirs' application upon finding that partitioning would be advantageous to them. Otherwise, an application for partition would have to be filed by the heirs. Appellants make no showing that BIA had authority to partition these particular allotments without application, or that any of the owners previously filed an application for partition that was improperly denied. Under the circumstances, BIA's failure to partition these allotments cannot be considered error. 8/

Appellants next argue that BIA should have promulgated regulations ensuring that their interests in the allotments were protected under any lease. By statute BIA has the authority only to regulate Indian interests in trust and restricted allotments. It has no authority to promulgate rules regulating non-trust interests in Indian allotments. Appellants as fee simple owners are presumed to be capable of managing their own land holdings. The failure to promulgate such regulations is, therefore, not error.

Finally, appellants argue that BIA's leasing of the allotments without consultation with them has deprived them of their property without due process of law. This argument overlooks the basic law of cotenancy. Any cotenant

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8/ This decision in no way restricts appellants' right to seek partition at a future time.

possessing an undivided interest has a nonexclusive right to the use of the entire property. Appellants have a right to share in the total income from the entire property. The leases of trust interests approved by BIA show on their face that they do not cover all of the interests in the property. The lessees of these allotments were thus on notice that not all of the interests in the property were covered by the leases. The failure of the lessees to contact appellants and make arrangements with them for payment of their share of the lease rentals is not the responsibility of BIA. 9/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the November 6 and December 7, 1984, decisions of the Deputy Assistant Secretary--Indian Affairs (Operations) are affirmed. 10/

//original signed
Bernard V. Parrette
Chief Administrative Judge

I concur:

//original signed
Jerry Muskrat
Administrative Judge

9/ The Board notes that the relief appellants seek, a requirement that potential lessees negotiate and enter into lease agreements with them before BIA could approve a lease of the trust interests, would place appellants in a position superior to those persons for whom the United States has a trust responsibility.

10/ Because the Board finds that the present record is sufficient to allow full resolution of the questions of law raised in this appeal, appellants' request for oral argument is denied.